

IN THE SUPREME COURT OF MISSOURI

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No. SC84835

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R. MITCHEL BACHTEL and CARY M. BISBEY,

Appellants,

vs.

MILLER COUNTY NURSING HOME DISTRICT,

Respondent.

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ON APPEAL FROM THE CIRCUIT COURT OF MILLER COUNTY  
TWENTY-SIXTH JUDICIAL CIRCUIT

Hon. James A. Franklin, Jr.

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APPELLANTS' SUBSTITUTE BRIEF

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## JURISDICTIONAL STATEMENT

Plaintiffs R. Mitchel Bachtel and Cary M. Bisbey appeal from final judgments entered by the Circuit Court of Miller County on October 31, 2001. Those identical judgments were entered in favor of Defendant Miller County Nursing Home District on Defendant's Motions to Dismiss Plaintiffs' Petitions alleging wrongful discharge in violation of § 198.070 R.S. Mo. (2000). Defendant's Motions were granted on the basis that the Defendant is immune from suit by virtue of the doctrine of sovereign immunity.

Bachtel and Bisbey timely appealed the dismissal of their Petitions to the Missouri Court of Appeals for the Western District, which affirmed the judgment of the Circuit Court on August 27, 2002. Bachtel and Bisbey thereafter timely filed a Motion for Rehearing and Application for Transfer in the Court of Appeals, which was denied on October 1, 2002. Bachtel and Bisbey then timely filed their Application for Transfer in this Court pursuant to Missouri Rule of Civil Procedure 83.04, which was sustained on November 26, 2002. This Court thus has jurisdiction over this cause pursuant to Article V, Section 10 of the Constitution of the State of Missouri.

## STATEMENT OF FACTS

### A. Factual Background

Plaintiff/Appellant R. Mitchel Bachtel is a Licensed Practical Nurse who was an at-will employee of the Miller County Nursing Home District from February 15, 1995 to October 18, 2000. (L.F. 1). Plaintiff/Appellant Cary M. Bisbey is a doctor of osteopathic medicine licensed to practice medicine by the State of Missouri. (L.F. 6). Defendant/Respondent Miller County Nursing Home District is a body corporate which exists and operates pursuant to the “Nursing Home District Law” of Missouri, which is codified at §§ 198.200 to 198.350 R.S. Mo. (2000). (L.F. 1, 6). The Miller County Nursing Home District owns and operates the Miller County Nursing Home pursuant to a license issued by the State of Missouri designating the Home as a Skilled Nursing Facility. (L.F. 1). Bisbey was an at-will employee of Respondent, beginning his duties as Medical Director of the Miller County Nursing Home on September 1, 1997. (L.F. 6, 11). Bachtel’s job assignments at the Miller County Nursing Home included Primary Charge Nurse from February 1995 to August 1999; Quality Assurance Nurse and Wound Care Consultant from August 1999 to October 2000, with additional duties as a marketing representative added in August 2000 and continuing until the date of his termination. (L.F. 1-2).

In the summer of 2000, several residents of the Miller County Nursing Home contracted clostridium difficile (“C-diff”), a highly infectious disease. (L.F. 2, 7). By July of 2000, approximately five residents had C-diff and all five were assigned to rooms in the 100 hallway of the nursing home to minimize the chances of other residents being exposed to the infectious disease. (L.F. 2, 7). Although one of the symptoms of C-diff is constant diarrhea, the administration of an anti-diarrhetic is highly

contraindicated because stopping the diarrhea causes an infection of the colon which can become systemic and lead to the individual's death. (L.F. 2, 7). Bachtel, Bisbey and others repeatedly instructed the nursing staff at the Home on the dangerous and harmful consequences of administering anti-diarrhetic medications to residents infected by C-diff, and the potential grave harm that could come to such residents if they were given anti-diarrhetics. (L.F. 2, 7). Bachtel and Bisbey also advised Miller County Nursing Home Administrator John Dalton of the effect of anti-diarrhetics on residents infected with C-diff and the potential grave harm which could come to such residents if they were given anti-diarrhetics. (L.F. 2, 7).

Despite those warnings, Dalton, who is not a licensed physician, ordered an on-duty nurse to administer Immodium to the residents infected with C-diff. (L.F. 2, 7-8). At Dalton's direction, the nurse gave each of the residents infected with C-diff the anti-diarrhetic medication Immodium. (L.F. 3, 8). One of the residents became very sick as a direct result of the administration of Immodium and required hospitalization. (L.F. 3, 8). Upon learning of the administration of the Immodium, Bachtel and Bisbey appeared before the Board of Directors of the Miller County Nursing Home District on July 20, 2000 and again on July 24, 2000. (L.F. 3, 8). On those occasions, they informed the Board that Dalton had ordered the administration of medication contrary to the orders given by the Medical Director and that ordering the administration of such medication posed a substantial risk of physical harm to the residents and constituted abuse and neglect of such residents. (L.F. 3, 8). Bisbey also informed the Board that a new employee who had tested positive for Tuberculosis had been permitted to work with residents in violation of state regulations, and that nursing home residents had been endangered as a result. (L.F. 8). Bisbey recommended to the Board that the Administrator and the

nurse who had administered the Immodium without a doctor's order be terminated. (L.F. 8).

Bisbey made a formal complaint to the Missouri Division of Aging relating to five residents of the Miller County Nursing Home infected with C-Diff who were abused by the improper administration of Immodium without the order of a physician. (L.F. 9). The Division investigated Bisbey's complaint and found: (a) the facility failed to follow professional standards of practice; (b) the registered nurse did not follow accepted standards of practice in writing the Immodium orders without first contacting Bisbey; (c) the Administrator and other supervisory nursing staff did not properly supervise that nurse or restrict her practice in the facility after she committed the act; (d) the nurse received no reprimand for her actions; (e) the Administrator knew of her plan to write the order and did not ensure she followed appropriate procedures; and (f) the Board of Directors had knowledge of the incident and as of November 17, 2000 had taken no corrective actions. (L.F. 9).

During the period of September 10-15, 2000, the Missouri Division of Aging surveyed the Miller County Nursing Home for deficiencies in operation of the home and the treatment afforded to residents. (L.F. 3, 9). Bachtel and Bisbey were questioned by the survey staff and provided truthful and candid answers to those questions. (L.F. 3, 9). Following the survey, the Division of Aging submitted a Statement of Deficiencies to the Miller County Nursing Home District. (L.F. 3, 9-10). The Statement indicated that Bachtel had advised the Division of Aging representatives of widespread failure on the part of staff at the Miller County Nursing Home to report wounds on residents, which resulted in the failure to assess and treat wounds sustained by residents of the facility. (L.F. 3). As a result, in part, of statements by Bisbey, the Division of Aging found the Miller County Nursing Home was not notifying the resident's physician when the resident was injured, that resident assessments are

not accurate, and that the facility was not providing the necessary care and services to ensure residents maintain the highest mental, physical and psychosocial well being. (L.F. 10). Bisbey was fired as Medical Director of the Miller County Nursing Home on or about October 1, 2000. (L.F. 11). Bachtel was fired by the Miller County Nursing Home District on or about October 18, 2000. (L.F. 4).

B. Procedural Background

Bachtel filed a Petition in the Miller County Circuit Court on July 27, 2001. (L.F. 1). Bisbey filed a Petition in the Miller County Circuit Court on August 2, 2001. (L.F. 6). Both Petitions alleged wrongful discharge, namely that Bachtel and Bisbey were terminated because they had reported the abuse and neglect of Miller County Nursing Home residents to the Directors of the Miller County Nursing Home District and/or to the Missouri Division of Aging. (L.F. 4, 11). The Petitions alleged such termination violated the provisions of § 198.070.10 R.S. Mo. (2000) which prohibits dismissal of or retaliation against any employee of a nursing home who has reported any violation of laws, ordinances or regulations applying to the facility which the reporting person has reasonable cause to believe has been committed or has occurred. (L.F. 4, 10-11). Bisbey's Petition also stated as Count II a claim for wrongful breach of employment contract. (L.F. 12). That claim was voluntarily dismissed by Bisbey on October 12, 2001. (L.F. 29).

The Miller County Nursing Home District filed an Answer to Bachtel's Petition and a Motion to Dismiss on August 29, 2001. (L.F. 14, 25). It then filed a Motion to Dismiss Count I of Bisbey's Petition on September 6, 2001 and an Answer on September 10, 2001. (L.F. 27, 18). Each of the Motions to Dismiss asserted that the Plaintiff's Petition failed to state a claim upon which relief can be

granted, in that the Miller County Nursing Home District is a political subdivision of the State of Missouri and immune from suit for wrongful discharge pursuant to § 537.600 R.S. Mo. (2000). (L.F. 25, 27). The Honorable James A. Franklin, Jr. granted the Motions on the basis that the Miller County Nursing Home District is immune from suit by virtue of the doctrine of sovereign immunity, and entered separate, yet identical Judgments on October 31, 2001 dismissing both Petitions with prejudice. (L.F. 30, 31). Bachtel and Bisbey timely filed their Notices of Appeal with the Missouri Court of Appeals for the Western District on November 28, 2001. (L.F. 32, 35). The separate appeals were consolidated by order of the Court of Appeals entered on December 18, 2001. The Court of Appeals affirmed the judgment of the Circuit Court on August 27, 2002, and denied Bachtel and Bisbey's Motion for Rehearing on October 1, 2002. The consolidated appeals were transferred to this Court pursuant to Rule 83.04 by order entered on November 26, 2002.

POINTS RELIED ON

- I. The Trial Court Erred in Dismissing Appellants' Petitions Because Appellants' Wrongful Discharge Claims Fall Within a Statutory Exception to Sovereign Immunity in that Respondent is Subject to the Anti-Retaliation Provisions of Chapter 198 R.S. Mo. and the Legislature Created a Waiver of Sovereign Immunity by Making Nursing Home Districts Subject to the Provisions of Chapter 198 and Not Making Any Distinction Between How Nursing Home Districts and Other Nursing Home Operators Are Treated Under the Statute and by Stating That the Act Shall Not Be Construed to Limit the Right to Seek Damages.**

Stiffelman v. Abrams, 655 S.W.2d 522 (Mo. banc 1983).

H.S. v. Board of Regents, 967 S.W.2d 665 (Mo. App. E.D. 1998).

Clark v. Beverly Enterprises, 872 S.W.2d 522 (Mo. App. W.D. 1994).

Missouri Comm'n on Human Rights v. Red Dragon Rest., Inc., 991 S.W.2d 161 (Mo. App. W.D. 1999).

§ 198.012.1(2) R.S. Mo. (2000).

§ 198.070.10 R.S. Mo. (2000).

§ 198.093.6 R.S. Mo. (2000).

## ARGUMENT

**I. The Trial Court Erred in Dismissing Appellants' Petitions Because Appellants' Wrongful Discharge Claims Fall Within a Statutory Exception to Sovereign Immunity in that Respondent is Subject to the Anti-Retaliation Provisions of Chapter 198 R.S. Mo. and the Legislature Created a Waiver of Sovereign Immunity by Making Nursing Home Districts Subject to the Provisions of Chapter 198 and Not Making Any Distinction Between How Nursing Home Districts and Other Nursing Home Operators Are Treated Under the Statute and by Stating That the Act Shall Not Be Construed to Limit the Right to Seek Damages.**

**A. Standard of Review.**

In reviewing a circuit court's dismissal of a petition on the basis of sovereign immunity, the appellate court must determine if the facts pleaded and the inferences reasonably drawn therefrom state any ground for relief. Kanagawa v. State *By and Through* Freeman, 685 S.W.2d 831, 834 (Mo. banc 1985). The appellate court treats the facts averred as true and construes all averments liberally and favorably to the plaintiff. Id.

The Court of Appeals, in its opinion, addressed an issue that was neither raised nor briefed by the parties. That issue concerns whether sovereign immunity is an affirmative defense that must be pled and proven by the defendant. (Slip op. at p. 5). Counsel for Appellants has researched the issue and does not believe it will affect the disposition of this particular case, therefore, that issue will not be addressed in this brief. If this Court wishes to address that issue, Counsel will be glad to submit a

supplemental brief if the Court so requests.

B. Nursing Home Act Creates Statutory Waiver of Sovereign Immunity.

The court's primary purpose in interpreting statutes is to ascertain and give effect to the intent of the legislature. Missouri Comm'n on Human Rights v. Red Dragon Rest., Inc., 991 S.W.2d 161, 166 (Mo. App. W.D. 1999). The words of the statute are to be given their plain and ordinary meaning. Id. The court can also gain further insight into the legislature's object by identifying the problems sought to be remedied and the circumstances and conditions existing at the time of the enactment. Id.

The Omnibus Nursing Home Act was passed by the legislature to protect the health and safety of citizens who are unable to care for themselves. Stiffelman v. Abrams, 655 S.W.2d 522, 528 (Mo. banc 1983). Its passage was spurred by criticism that existing laws were inadequate and that state regulation was ineffective. Steve Vossmeier & Diane Felix, The Missouri Omnibus Nursing Home Act of 1979: A Legislative History, 24 St. Louis U. L.J. 617, 617 (1981). The Act came about after two legislative committees studying nursing home regulation concluded that the State, through its administrators and its laws, was unable or incapable of helping those nursing home residents who could no longer help themselves. Id. at 624. Because the Act is directed to protecting the health and safety of Missouri's nursing home population, it should be liberally construed to accomplish that purpose. Stiffelman v. Abrams, 655 S.W.2d at 528.

The Act applies to Nursing Home Districts. § 198.012.1(2) R.S. Mo. (2000). It prohibits any person who directs or exercises any authority in a nursing home from retaliating against an employee who makes a good faith report of any violation or suspected violation of laws, ordinances or regulations

applying to the nursing home. § 198.070.10 R.S. Mo. (2000). Protecting employees who report abuse from being fired or otherwise retaliated against serves the Act's purpose of helping to protect nursing home residents from abuse. Bachtel and Bisbey's Petitions specifically cited § 198.070 as the basis for their claims of wrongful discharge. (L.F. 4, 10-11).

1. *Legislature Intended to Create a Private Cause of Action.*

One of the Act's sponsors has stated that "the legislature intended to encourage methods of private enforcement" because it "recognized that government cannot do everything and that some requirements of the Act can best be enforced by those most directly involved. It is the purpose of the law to provide tools to these individuals to see that it is enforced." Vossmeier & Felix, 24 St. Louis U. L.J. at 660. A provision was added to the legislation authorizing a private right of action to enforce the protections granted under the Act. *Id.* at 644-45. That provision states, in pertinent part:

Nothing contained in sections 198.003 to 198.186 shall be construed as  
abrogating, abridging or otherwise limiting the right of any person to bring appropriate  
legal actions in any court of competent jurisdiction to insure or enforce any legal right  
*or to seek damages . . .*

§ 198.093.6 R.S. Mo. (2000) (emphasis added).

The Missouri Court of Appeals for the Western District reaffirmed that a private right of action exists for fired nursing home employees who wish to bring a wrongful discharge action under § 198.070. Clark v. Beverly Enterprises, 872 S.W.2d 522, 525 (Mo. App. W.D. 1994). As the court noted, § 198.070 requires nursing home employees to report any instances of abuse or neglect, and makes it an infraction to fail to make such a report. *Id.* In

finding a private right of action, the court stated, “it would be illogical to say the legislature did not intend to allow private causes of action when it created a statute which compels an employee to report violations of the law, and protects her from retaliation or dismissal or conversely subject her to a penalty for failure to report a violation.” Id.

2. *Private Right of Action Extends to Nursing Home Districts.*

The plain language of the statute shows that the private right of action applies to Nursing Home Districts. The statute says that *no person* who directs or exercises any authority in a facility shall dismiss or retaliate against a resident or employee. § 198.070.10 (emphasis added). The plain meaning of those words shows that the legislature intended that the full range of the Act’s protections would be extended to employees, and ultimately, to residents of all nursing homes subject to the Act.

As the Missouri Court of Appeals for the Eastern District has noted, a waiver of sovereign immunity exists where a statute provides equal treatment to all entities subject to its provisions. H.S. v. Board of Regents, 967 S.W.2d 665, 673 (Mo. App. E.D. 1998). The court in H.S. found that an award of emotional distress damages and attorneys fees and costs under the Missouri Human Rights Act were not barred by sovereign immunity. Id. While the MHRA does not contain language expressly waiving sovereign immunity, it does define “employer” to include the state and its political subdivisions, and makes it illegal for an “employer” to discriminate. Id. citing §§ 213.010(6); 213.055 R.S. Mo. (1994). The court noted that the MHRA treats the state and its political subdivisions the same as it treats other employers, and that if the legislature had intended for the state and its political subdivisions to be

immune from liability, the statute would have reflected that intent. H.S. v. Board of Regents, 967 S.W.2d at 673.

The Court of Appeals for the Western District followed a similar analysis in construing the legislative intent of the MHRA in a non-sovereign immunity case. At issue was whether the MHRA, through § 213.065, was intended to state a cause of action for associational discrimination in the use and enjoyment of public accommodations. Missouri Comm’n on Human Rights v. Red Dragon Rest., Inc., 991 S.W.2d at 166-67. The section in question was written to provide “[a]ll persons” the right to the “full and equal use and enjoyment within this state of any place of public accommodation.” § 213.065.1 R.S. Mo. (1986) (emphasis added). The court noted that the plain meaning of those words indicated the general purpose of the MHRA was to prevent *anyone* in the state of Missouri from being refused public accommodations because of discriminatory attitudes. Missouri Comm’n on Human Rights v. Red Dragon Rest., Inc., 991 S.W.2d at 167 (emphasis in original). In finding the legislature intended to state a cause of action for associational discrimination, the court stated, “[t]he plain language of the statute extends its protection to all people within the state of Missouri . . . [n]owhere does the statute limit its application.” Id.

The same reasoning used in the above two cases applies in interpreting the Nursing Home Act. As noted above, the Nursing Home Act specifically applies to Nursing Home Districts. As also noted above, § 198.070 has been construed to create a private right of action for wrongful discharge. Section 198.070 treats Nursing Home Districts the same as all other nursing home operators by providing that “*no person* who directs or exercises any

authority in a facility shall . . . dismiss or retaliate against a . . . employee . . .” § 198.070.10 (emphasis added). The Act also contains a provision stating that it shall not be construed to limit or abridge the right to bring a civil action for damages. § 198.093.6. The plain meaning of those two sections is to extend the protections of the Act to employees of all nursing homes covered by its provisions. The statutes contain no language limiting those protections. As is the case in H.S., if the legislature had intended for Nursing Home Districts to be immune from civil liability for violations of the Act, the statute would reflect that.

The statute does not reflect an intent to make Nursing Home Districts immune from civil liability for violations of the Act, because such treatment would subvert the purposes for which the Omnibus Nursing Home Act was passed. Applying sovereign immunity to § 198.070 leaves employees of Nursing Home Districts without any effective protection if they report suspected instances of patient abuse. In turn, residents of those homes will be more exposed to the potential for abusive or neglectful treatment. This Court has previously described the Act as “a major legislative effort towards remedying indigenous areas of abuse in the operation of nursing homes.” Stiffelman v. Abrams, 655 S.W.2d at 529. The Nursing Home Act, as a remedial statute, is not to be strictly construed even though it changes a rule of the common law. O’Grady v. Brown, 654 S.W.2d 904, 908 (Mo. banc 1983). Instead, it is to be broadly construed with all reasonable doubts construed in favor of applicability to the case. Missouri Comm’n on Human Rights v. Red Dragon Rest., Inc., 991 S.W.2d at 166-67. Additionally, the statute is to be interpreted in a way that subserves legislative intent, which is assumed to be to serve the best interests and welfare of the citizenry at large. Tribune Pub. Co. v. Curators of

the Univ. of Missouri, 661 S.W.2d 575, 583 (Mo. App. W.D. 1983).

The best interests and welfare of the citizenry at large is served by ensuring that all nursing home employees and residents enjoy the same rights and protections under the Omnibus Nursing Home Act. This Court should therefore reverse the trial court's dismissal of Bachtel and Bisbey's petitions and allow them to go forward with their civil actions against the Respondent.

## CONCLUSION

WHEREFORE, for the reasons set forth above, Appellants R. Mitchel Bachtel and Cary Bisbey ask that the judgment of the circuit court be reversed and that this case be remanded to the circuit court.

Respectfully Submitted,

**RINER & WALKER, P.C.**

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned hereby certifies, pursuant to Rule 84.06, that this Brief complies with the limitations set forth in Rule 84.06(b) and contains 3,992 words as calculated pursuant to the requirements of Rule 84.06(b)(2); and that a copy of the brief has been supplied to the Court in diskette form on a diskette that has been scanned and found to be virus free.

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# CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing brief were served by first class mail, postage prepaid, this 13th day of December, 2002 on Thomas E. Rice, Jr., 2400 Pershing Road, Suite 500, Kansas City, MO 64108, Attorneys for Respondent.

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## APPENDIX